United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

75-7318

United States Court of Appeals

FOR THE SECOND CIRCUIT

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FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

DOMINICK PAMPILLONIA,

Plaintiff,

vs.

CONCORD LINE, A/S,

Defendant and Third-Party Plaintiff-Appellee,

vs.

COURT CARPENTRY AND MARINE CONTRACTING CO.,

Third-Party Defendant-Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING *EN BANC*

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PETITION FOR REHEARING WITH A SUGGESTION FOR A HEARING *EN BANC*

Appellant seeks a rehearing because in reaching its decision, the Court overlooked the fact that the decision below is based upon a misconception of the rule governing the admissibility and effect of testimony with respect to custom and usage.

POINT I

Evidence of a custom generally in use in a particular industry has no probative force in establishing that appellant breached any duty.

In holding that "C.C. Lumber's custom of using grease in lashing operations establishes the possession of grease by their employees prior to the accident" was established by Captain Wheeler's testimony, the trial Court cited as authority the case of *Eaton* v. *Bass* and *Wooden* v. *Hoover Motor Express*, 214 F 2d 896 (6 Cir. 1954) and 1 *J. Wigmore on Evidence*, Sec. 92 (3d Ed. 1940).

As the Court pointed out in *Eaton* v. *Bass* and *Wooden* v. *Hoover Motor Express, supra*, at page 899, the existence of a particular fact may be established by evidence of custom and usage, but it can be established only by evidence of the custom and usage of the person sought to be charged with the particular act and not by the custom and practice of a particular industry.

As Judge Waterman notes in his concurring opinion in *Ceresti* v. *New York, New Haven & Hartford R. Co.*, 231 F 2d 50 (2 Cir. 1956) cert. den. 351 U.S. 951 (1956), such evidence is characterized as "habit" evidence and testimony as to a custom and practice has no probative value unless it establishes that the custom and practice was a regular routine of the party sought to be charged with the

act. At pages 58-59 he said:

> "In order to be characterized as 'habit' or 'custom' an act must have been repeated on a sufficient number of occasions so as to have become habitual, i.e., a regular response to a given situation. See the Model Code of Evidence (A.L.I., 1942) Rule 307 and the Uniform Rules of Evidence (1953) Rule 50."

It should be noted that in overruling appellant's objection to the reception of Captain Wheeler's testimony, the Court agreed that the evidence must establish that the custom or practice was a regular routine of the party sought to be charged with an act before it can be given any probative force. It said:

> "The Court: You would agree that if Captain Wheeler were familiar with the custom and practice of the C.C. Lumber Co., Inc., if he knew that every day they took a grease pot out when they did lashing and he could testify to that that he knew what the custom and practice was, I don't suppose you'd argue about that. You'd say, 'well, that is a matter of habit of the individual.
>
> If they've done that over a period of years and done it every time they went out lashing, the jury from that can infer they did it this time." (216-217)*

Even though Captain Wheeler conceded that he did not take particular note on how many occasions he saw employees of C.C. Lumber doing lashing (231) or whether they ever had grease pot with them (231), the trial court nevertheless concluded that "C.C. Lumber's custom of using grease in lashing operations establishes the possession of grease by their employees prior to the accident."

It does seem that since Captain Wheeler could not state whether he saw employees of C.C. Lumber with grease pots

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* Numbers in parentheses refer to pages in the Appendix.

and did not take note on how many occasions employees of C.C. Lumber were doing lashing, neither the necessary regularity nor the use of grease as a habit was established either directly or otherwise even under the trial court's definition of habit evidence.

In any event, since it also was undisputed that appellant had not done any lashing work prior to the plaintiff's accident (Point IV of main brief), habit testimony cannot establish the doing of an act on an occasion when appellant was not engaged in the conduct which would give rise to the act which is the subject matter of the habit.

CONCLUSION

The petition for rehearing should be granted and the relief heretofore prayed for allowed, or in the alternative, this matter be heard *en banc*.

Respectfully submitted,

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On brief:

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